



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. _____

76-1841

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

HOME BOX OFFICE, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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American Broadcasting Companies, Inc. ("Petitioner") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 25, 1977.¹

¹The case below consisted of fifteen consolidated petitions for review of orders of the Federal Communications Commission. Petitioner brought two of those (Nos. 75-1788 and 75-2130) and was Intervenor in six others (Nos. 75-1280, 75-1342, 75-1358, 75-1430, 75-1496 and 75-1555).

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. The *First Report and Order* of the Federal Communications Commission ("Commission") in Dockets 19554 and 18893 is reported at 52 FCC 2d 1 (1975) and its *Memorandum Opinion and Order* acting on petitions for reconsideration thereof is reported at 54 FCC 2d 797 (1975).

The full texts of the opinions below are printed in Appendices A-G to the Petition for Writ of Certiorari filed by the Commission in these cases on June 3, 1977, *sub nom. Federal Communications Commission v. Home Box Office, Inc.* (No. 76-1724). For convenience, reference herein will be to the Commission's Appendices ("FCC App.").

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1977 (FCC App. G, pp. 243-246). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Commission lacks jurisdiction to regulate pay television orginations by cable television systems which also carry broadcast signals.

2. Whether the Court of Appeals erred in holding that pay cable regulations are barred by the First Amendment to the Constitution and that identical regulations, applicable to over-the-air pay television, are not.

3. Whether the Court of Appeals applied an improper standard of judicial review in insisting that the Commission must await the occurrence of actual public injury

before regulating and that it cannot reasonably anticipate and plan in advance of foreseeable events.²

STATUTES INVOLVED

Pertinent provisions of the Communications Act of 1934, as amended are set forth in FCC App. I, pp. 251-252.

STATEMENT

1. This petition seeks review of an opinion and judgment (FCC App. A, pp. 1-122 and G, pp. 243-246) invalidating those portions of the Commission's regulations applicable to pay cablecasting, while affirming their validity as applied to over-the-air pay television. The regulations were designed by the Commission to prevent program "siphoning," i.e., the diversion to a system or systems of pay television of the same entertainment and sports programs regularly distributed through the advertiser-supported ("free") television system.

Pay cable is a system of program origination by cable television systems which also carry multiple broadcast signals, whereby one or more channels are dedicated (by the cable operator or a lessee) to the transmission of "scrambled" programs which are unscrambled upon the payment by the subscriber of a fee (per program or per channel) additional to the usual monthly subscription

²The Court of Appeals also ruled that the procedures followed by the Commission in its informal rulemaking, characterized by *ex parte* presentations invited by the Commission's Notice, were improper and, depending upon the outcome of further proceedings ordered, possibly vitiated the validity of the rules altogether (FCC App. A, pp. 92-108). While Petitioner believes this ruling is also in error and presents substantial questions requiring review by this Court, we defer to the Commission's presentation of the point in its June 3, 1977 Petition for Writ of Certiorari (pp. 28-43).

charge for the regular cable service. Over-the-air pay television is the broadcast, over a regular television channel, of a "scrambled" picture which the subscriber, upon payment of a fee, is enabled to unscramble through a device installed at the television set.

The rules adopted by the Commission (and considered by the Court of Appeals) applied alike to pay cable and over-the-air pay television and were modifications of earlier, generally more restrictive, rules initially adopted to apply only to over-the-air pay television.³

The Court of Appeals ruled that the regulations, while valid when applied to over-the-air pay television, were invalid in the case of pay cable transmissions because (a) the Commission is without statutory authority to limit pay cable originations (FCC App. A, pp. 37-75) and (b) even if statutory authority existed, any such limitations would be barred by the First Amendment (FCC App. A, pp. 75-91).

Upon Commission motion, the Court of Appeals stayed its mandate, pending possible review by this Court, except for its striking down the rule limiting pay cable's use of theatrical feature films (FCC App. H, pp. 247-249). This limited stay was granted because the Commission advised the Court below that for reasons not explained, the Commission would not contest the Court's ruling with respect to feature films. Petitioner strongly believes that review by this Court should comprehend clarification of the entire question of the Commission's authority and responsibility to adopt such

³ Neither these rules, nor any other, apply to other methods of pay television distribution, for example, closed circuit cable originations disassociated from carriage of television broadcast signals, theatrevision or the like. The Commission has never had occasion to decide the question of its authority to regulate such services.

effective anti-siphoning regulation as is called for by the public interest, particularly since the Commission has offered no explanation for reversal of its position.⁴

2. The opinion of the Court of Appeals was issued against the background of lengthy deliberations over public interest problems foreseen from the development of pay television, first over-the-air and, later, as pay cable. Commercial U.S. radio and television broadcasting has developed solely on an advertiser supported basis.⁵ Shortly after World War II, however, various proponents of pay television brought their proposals to the Commission, and Commission consideration of such proposed operations began in the early 1950's. After conducting several

⁴"... [A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston TV Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923 (1971) (Footnotes omitted).

⁵At the First National Radio Conference in 1922, then Secretary of Commerce Herbert Hoover observed that in "certain countries the government has prohibited the use of receiving instruments except upon payment of a fee out of which are supported government sending stations. I believe that such a plan would seriously limit the development of the art and its social possibilities . . ." By the Fourth Conference in 1925, he was able to report, "The decision that we should not imitate some of our foreign colleagues with governmentally controlled broadcasting supported by a tax upon the listener has received for us a far greater variety of programs and excellence in service free of cost to the listener. . ." Thus, "When Congress debated the legislation which emerged as the Radio Act of 1927 [predecessor to the Communications Act of 1934], the practice of 'free' broadcasting had become established and was universally followed [in this country]." *First Report on Subscription Television*, 23 FCC 532, 539, 16 RR 1509, 1517 (1957).

experiments and receiving extensive comments on the public issues associated with pay television, the Commission, in 1968, authorized over-the-air pay television service, limiting the programs which could be presented by such service in order to preserve the free system.⁶ Challenges to the Commission's authority, and the constitutionality of the restrictions under the First Amendment, were rejected by the District of Columbia Circuit, the Court finding such limitations proper "to insure the continuing economic vitality of free television . . ."⁷ The Court approved the Commission's premise that there would be no discernible public interest served if pay television programming "is merely duplicative of types of programs now appearing on free TV in quantity."⁸ and accepted the validity of the stated purpose of the regulations — to channel pay television into offering diverse programs — concluding that "the likely result of the Commission's action is to provide the public with additional information and ideas rather than repressing existing sources."⁹

3. While these deliberations proceeded, the Commission, in 1965, addressed the separate public interest problems associated with the explosive growth of cable

⁶*Fourth Report on Subscription Television*, 15 FCC 2d 466 (1968), *aff'd sub nom. National Association of Theatre Owners v. FCC*, 136 U.S. App. D.C. 532, 420 F.2d 194 (1969), *cert. den.* 397 U.S. 922 (1970). The rules then adopted and affirmed were more generally restrictive than those considered by the Court in its *Home Box Office* opinion.

⁷*National Association of Theatre Owners v. FCC*, *supra*, 136 U.S. App. D.C. at 366, 420 F.2d at 208.

⁸*Fourth Report*, *supra*, 15 FCC 2d at 484.

⁹*National Association of Theatre Owners v. FCC*, *supra*, 136 U.S. App. D.C. at 366, 420 F.2d at 208.

television. At that time, such systems seldom originated programming and never on a per-program or per-channel charge basis. The focus of the Commission's early inquiry was therefore limited to the impact on television broadcasting of cable's carriage of broadcast signals, particularly "distant" signals, i.e., those not readily available off the air, but made available through the use of sophisticated receiving antennas or microwave transmissions. The Commission's authority to regulate cable carriage of such signals was unanimously affirmed by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968). This Court approved the specific regulations adopted and affirmed the Commission's authority over cable television as including "that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."¹⁰

Thereafter, in an effort to introduce greater diversity in the service provided by cable television systems, the Commission adopted an order requiring systems of substantial size to originate specified amounts of local programming.¹¹ On reconsideration of that order, it being pointed out that cable originations, particularly if accompanied by per program or per channel charges, could lead to program "siphoning" exactly as in the case of over-the-air pay television, the Commission imposed upon such originations (where per program or per channel charges were made), the same limitations as had been earlier applied to over-the-air pay television.¹²

¹⁰ *United States v. Southwestern Cable Co.*, *supra* at 178.

¹¹ *First Report and Order* in Docket No. 18397, 20 FCC 2d 201 (1969).

¹² *Memorandum Opinion and Order* in Docket No. 18397, 23 FCC 2d 825 (1970).

This Court considered the mandatory origination requirements (but not the pay cable limitations) in *United States v. Midwest Video Corp.*, 406 U.S. 649, *reh. den.*, 409 U.S. 898 (1972). Affirming the Commission's authority to *require cable originations* by only the narrowest of margins, the Court nonetheless appeared unanimous on the question of the Commission's authority to adopt regulation of programs offered through cable originations. Thus, the plurality opinion observes:¹³

"In the one case, of course, the concern is with the strength of the picture [referring to *Southwestern*] and voice received by the subscriber, while in the other it is *with the content of the programming offered*. But in both cases the rules serve the policies of §§1 and 303(g) of the Communications Act on which the cablecasting regulation is specifically premised, [citations omitted] and . . . 'facilitate the more effective performance of [its] duty to provide a fair, efficient, and equitable distribution of television service to each of the several States and communities' under §307(b)."

The views of the dissenting Justices appear entirely consistent:¹⁴

"The fact that *the Commission has authority to regulate origination of programs if CATV decides to enter the field* does not mean that it can compel CATV to originate programs."

4. Largely at the urging of the major Hollywood producers, the Commission conducted further rulemaking, commencing in 1972, to investigate possible revision of the substantive limitations then applicable to both over-

¹³ *United States v. Midwest Video Corp.*, 406 U.S. at 669-70. Emphasis supplied.

¹⁴ *Ibid.* at 680. Emphasis supplied.

the-air pay television and pay cable originations. Its 1975 decision relaxed those limitations uniformly in respect to both services. There followed the decision by the Court of Appeals, striking down the rules as applied to pay cable and affirming them in the case of over-the-air pay television.

REASONS FOR GRANTING THE WRIT

The writ should be granted because the decision of the Court of Appeals: (1) raises important questions involving the administration of the Communications Act and the future of television broadcasting in the United States; (2) is in conflict with the decisions of this Court in *Southwestern* and *Midwest Video*; (3) is in conflict with many decisions of other circuit courts, including the District of Columbia Circuit; and (4) applies an improper standard for review of agency action by depriving the Commission of discretion to "plan in advance of foreseeable events."

I.

THE DECISION PRESENTS IMPORTANT QUESTIONS INVOLVING THE ADMINISTRATION OF THE COMMUNICATIONS ACT AND THE FUTURE OF TELEVISION BROADCASTING

Section 1 of the Communications Act directs the Commission ". . . to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges . . ."¹⁵ Section 307(b) commands the Commission to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States

¹⁵ 47 U.S.C. § 151.

and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.”¹⁶ In furtherance of these statutory goals, the Commission has promoted a nationwide system of advertiser-supported television broadcasting, now providing multiple services to virtually all of the people of the United States at no direct charge. As observed by this Court, the significance of the Commission’s efforts “can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation’s population.”¹⁷

Pay television, by definition, is available at most only to a minority able and willing to pay. In addition, because of technical and economic considerations, many of those able and willing to pay will not have the service available. As acknowledged by the opinion below,¹⁸ the costs associated with wiring the nation limit cable and pay cable to a small, probably affluent, minority:

“Extension of service to other urban areas [in addition to New York City and parts of California] might be accomplished at a capital cost of some \$8 billion, but laying cable to reach that half of the American population which lives in rural areas would . . . be extremely expensive, perhaps requiring an additional \$240 billion. [Footnote omitted]. Because of these capital requirements, extension of cable service with cablecasting capability to the country as a whole does not seem possible in the immediate future.”

¹⁶ 47 U.S.C. §307(b).

¹⁷ *United States v. Southwestern Cable Co.*, *supra*, at 177.

¹⁸ FCC App. A, pp. 34-35.

Yet, as found by the Commission, a small number of paying subscribers can generate more revenue than the advertiser-supported system for the same entertainment and sports attractions heretofore available to all through that system. The Commission referred to estimates by Stanford Research Institute and others:¹⁹

“ . . . that by 1980 the number of pay subscribers, both cable and STV, will reach 11,805,000 and pay revenue will reach \$1.67 billion; more than the combined program expenses of the three television networks in 1973 . . . Six million cable homes could raise over \$43 million to compete for pro football rights if \$1 were charged for each regular game and 25 percent of subscribers watched, and \$3 were charged for the Super Bowl and 50 percent of subscribers watched . . . by serving four million subscribers and imposing an additional monthly fee of \$1, cable television could take in \$1 million more revenue than free television derives from its broadcast of all NFL games and the World Series.”

Recognizing the self-evident economic incentive of program producers, sports entrepreneurs and the cable industry to prefer the most profitable method of distribution (either by over-the-air frequencies or cable systems), the Commission undertook regulation to promote truly diverse offerings through pay television “while at the same time insuring that the public’s reliance on conventional television is not unreasonably impaired.”²⁰

The opinion below leaves the Commission powerless to preserve the present nationwide, advertiser-supported system, thus defeating continued achievement of the

¹⁹ FCC App. C, p. 131.

²⁰ FCC App. C, p. 165.

statutory goals of providing a "fair, efficient and equitable" distribution of television service to "all of the people of the United States." (47 U.S.C. §§151, 307(b)).

II.

THE DECISION IS IN CONFLICT WITH THIS COURT'S OPINIONS IN *SOUTHWESTERN* AND *MIDWEST*.

The decision is not consistent with the decisions of this Court in *Southwestern* and *Midwest*. In *Southwestern*, referring to the Commission's responsibilities under Sections 151 and 307(b), this Court unanimously affirmed the Commission's authority to regulate the amount of distant television broadcast signals and programming which cable could carry because unlimited carriage of such signals and programming threatened economic injury to local stations, inconsistent with orderly achievement of the Commission's statutory goals. More broadly, this Court found Commission authority for cable regulation "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting."²¹

In *Midwest*, the Court also affirmed the Commission's right to compel local originations by cable systems, noting that the effect of the regulation ". . . is to assure that in the retransmission of broadcast signals viewers are provided suitably diversified programming. . ."²²

The decision below, however, even though acknowledging Commission authority to regulate cable's carriage of broadcast signals and the programming thereon to prevent destructive competition and acknowledging authority to

²¹ *United States v. Southwestern Cable Co.*, *supra*, 392 U.S. at 178.

²² *United States v. Midwest Video Corp.*, *supra*, 406 U.S. at 668.

regulate originations to promote diversity, denies authority to regulate pay originations exercised *both* to prevent destructive competition *and* to promote diversity.

The reasoning by which the Court below avoided a seemingly inevitable finding of jurisdiction is both irrelevant and curious. Referring to a "thicket of disagreement between this court and the Commission,"²³ the opinion discusses at length an on-going controversy concerning Commission responsibility to regulate radio format changes.²⁴ Noting that the Commission, in rule-making following the Court's *en banc* decision holding that it has responsibility to consider radio format changes, has refused to acquiesce, the Court reasoned the Commission has no greater authority to consider the "formats" of television and pay television services than it has to consider radio formats.²⁵

Anti-siphoning regulation, however, is not format regulation. Rather, it is regulation, under *Southwestern* and *Midwest*, to preserve, rather than impair, the nationwide television system for which the Commission is responsible under Sections 1 and 307. As such, it is regulation "reasonably ancillary" to the Commission's responsibilities for television broadcasting.

²³ FCC App. A, p. 44.

²⁴ FCC App. A, pp. 44-52.

²⁵ *Citizens Committee to Save WEFM v. FCC*, 165 U.S. App. D.C. 185, 506 F.2d 246 (1974). Thereafter, the Commission declined to accept the validity of the Court's ruling. *Memorandum Opinion and Order*, 60 FCC 2d 858 (1977) — an action itself again on appeal in the District of Columbia Circuit (Case Nos. 76-1692 and 76-1793).

III.

THE DECISION IS IN CONFLICT WITH THOSE OF OTHER CIRCUITS, INCLUDING THE DISTRICT OF COLUMBIA CIRCUIT.

The decision below, both in its statutory construction and Constitutional objections, fails to recognize the relationship between anti-siphoning regulation and the Commission's authority to regulate carriage of television broadcast signals. Thus, the opinion states "on the record before us there is no evidence that cablecasting and signal retransmission are not completely separate and distinct activities . . . (no 'nexus' between broadcast and retransmission functions)."²⁶

The Eighth Circuit, to the contrary, plainly found the required "nexus" for Commission regulation and rejected Constitutional objections similar to those embraced by the opinion below:²⁷

"The Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. *It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service.* Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it. The public interest in preventing such a development is manifest."

²⁶ FCC App. A, p. 79.

²⁷ *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968). Emphasis supplied.

The power of the Commission to regulate cable and adopt reasonable limitations consistent with the First Amendment because cable carries broadcast signals has been likewise recognized by numerous other circuits, including the District of Columbia Circuit.²⁸ The inconsistency of the opinion below is apparent in its efforts to explain and distinguish.²⁹

IV.

THE DECISION APPLIES AN IMPROPER STANDARD FOR REVIEW OF AGENCY ACTION.

The opinion below requires that the case for program siphoning be "proved" before regulation is undertaken.³⁰ Rather than allowing the Commission to anticipate predictable economic events and resulting public interest consequences, the opinion appears to insist that actual program siphoning must occur before regulatory action is undertaken.³¹

It must be conceded that, while the pay cable industry is rapidly growing (from 16,000 in 1973 to over 1 million in 1977), it does not yet have the economic capacity to outbid free television for much, if any, of its program attractions. The Court below, however, is in error in denying the Commission authority, in its in-

²⁸ *Titusville Cable TV, Inc. v. United States*, 404 F.2d 1187 (3d Cir. 1968); *Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 23 (9th Cir. 1969); *Conley Electronics Corp. v. FCC*, 394 F.2d 620 (10th Cir. 1968), *cert. den.*, 393 U.S. 858; *Buckeye Cablevision, Inc. v. FCC*, 128 U.S. App. D.C. 262, 387 F.2d 220 (1967); *Midwest Television, Inc. v. FCC*, 138 U.S. App. D.C. 228, 426 F.2d 1222 (1970).

²⁹ FCC App. A, pp. 78-79, n. 80.

³⁰ FCC App. A, p. 64.

³¹ FCC App. A, p. 62-67.

formed discretion, to regulate in advance of development of that economic power and in requiring that it await its occurrence.

In *Southwestern*, this Court recognized that the Commission was undertaking regulation of broadcast signal carriage at a time when "it could not predict with certainty the consequences of unregulated CATV."³² The Court nonetheless found it proper for the Commission to "plan in advance of foreseeable events, instead of waiting to react to them."³³ Other Courts have equally held that an administrative agency, in its rulemaking function, "does not have to wait for evidence that can only be supplied by the future,"³⁴ Indeed, the *NATO* panel of the same Circuit approved the reasonableness of "regulation in advance" of more stringent rules at a time when no pay television stations were in operation or in the offing.³⁵

³² *U.S. v. Southwestern Cable Co.*, *supra*, 392 U.S. at 176-177.

³³ *Ibid.* at 177.

³⁴ *National Association of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526, 541 (2d Cir. 1975). See also, *U.S. v. Detroit and Cleveland Navigation Co.*, 326 U.S. 236 (1945) and *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961).

³⁵ The opinion's reference to the possibility that "regulation in advance" of over-the-air pay television "had the effect of killing that medium in its infancy by denying it access to necessary programming" (FCC App. A, p. 37) is gratuitous and inaccurate. A major over-the-air problem was the continued absence of a security system adequate to prevent the average home owner from unscrambling transmitted pictures without subscribing. With the reputed development of such a security system, multiple pay television applications were filed (by January 1977, 24 applications had been filed and five granted) and two stations went on the air (in New York City and Los Angeles) — all of this activity before issuance of the opinion below and at a time when the operators had to assume program access would be limited by the regulations in question.

The standard which the Court should have applied was whether the Commission's forecast of the likelihood of program siphoning was "arbitrary and capricious."³⁶ Given the readily predictable amount of revenue which pay systems can generate, the amount of money which the free television system can economically justify for program acquisitions, and the undoubted desire of any entrepreneur to obtain maximum revenue for his product, an "arbitrary and capricious" conclusion would not be possible. The effect of the decision was, therefore, to substitute the Court's policy judgment for that of the responsible agency.

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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³⁶ See, for example, *SEC v. Chenery Corporation*, 332 U.S. 194 (1947); *United Air Lines v. CAB*, 97 U.S. App. D.C. 42, 228 F.2d 13 (1955).